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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

HUMBERTO RIVERA,

*Petitioner,*

v.

UNITED STATES OF AMERICA

## REPLY BRIEF FOR PETITIONER

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The petitioner submits this brief in reply to the Brief for the United States in Opposition (hereinafter, "Br. Opp.").

1. The government's summary of the evidence presents as an uncontested fact an admission that petitioner allegedly made to INS agents after receiving *Miranda* warnings: namely,, "that he had harbored illegal aliens at his apartment." Br. Opp. at 2. This statement is both oversimplified and irrelevant.

It is true that Agent Ramos testified that petitioner admitted sharing his apartment with seven or eight aliens and transporting two females from Houston to keep house for the group. C.A. App. 139. On cross-examination, the agent asserted for the first time that petitioner (who by the time of his arrest had already applied for temporary residency under 8 U.S.C. § 125a) confessed to knowing that all of the persons

living in his apartment were illegal. C.A. App. 142. Ramos, however, was impeached with his own investigative report, which recorded such an admission only as to the two females and not as to the other persons who shared petitioner's apartment. C.A. App. 143-44.

The record reveals that any statements made by petitioner to the agent about sharing his apartment with other aliens were not only tangential to the merits but also fell far short of the clear-cut confession of harboring depicted in the government's brief. Petitioner was not tried for harboring but for alleged transportation offenses. None of the charges involved the two females, who were the only persons whose illegal status was supposedly admitted by petitioner in the statement recorded in the agent's report. Thus, any admission as to "harboring" the two females was entirely beside the point, and it was hotly contested whether petitioner made any statement to Agent Ramos that was probative of the charges on which Rivera was convicted. C.A. App. 260, 265. Given the conflicts in the evidence concerning the agent's interrogation of petitioner, this is manifestly not a case in which the use of deposition testimony in violation of the Confrontation Clause could be excused as harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

2. By according an inordinately narrow reading to *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987), the government seeks to avoid the direct conflict between that decision and the opinion of the court of appeals in the case at bar. Specifically, the government characterizes *Guadian-Salazar* as turning solely on a standing order under which material witnesses in cases involving immigration offenses were

deposed and released as a matter of course, without the exercise of any discretion by the district court. The government now contends that only because of the standing order did it confess error in *Guadian-Salazar*; only for that reason, it implies, did the Fifth Circuit reverse the conviction that had been procured through the use of deposition testimony in that case. Br. Opp. at 7-8.

The opinion in *Guadian-Salazar* belies this interpretation. The defendant there attacked, on a variety of grounds, the use of deposition testimony given by deported aliens. Among those grounds was the claim that the government had failed to establish the unavailability of the deponents to testify at trial, and indeed had "virtually assured the witnesses' absence." *Id.* at 346. That is the very argument advanced by petitioner here. In confessing error in *Guadian-Salazar*, moreover, the government did not confine itself to acknowledging flaws in the district court's standing order on deposing material witnesses, but instead made the altogether broader concession that "there were no 'exceptional circumstances' sufficient under Rule 15 to justify deposing the witnesses." *Id.* at 347. In accepting the government's confession of error, the Fifth Circuit did not rest on the standing order but on careful examination of the record with respect to the joint contention of the government and the defendant

> that the use of the deposition testimony in this case deprived defendant of his constitutional right to confront adverse witnesses, and that in the circumstances of this case such deprivation worked to the actual prejudice of the defense.

*Id.*

Precisely the same deprivation of confrontation rights occurred here. Under *Chapman, supra*, it is doubtful that the reversal of petitioner's convictions requires him to make any showing of prejudice, given the government's total failure to prove the unavailability of its principal witnesses, whose absence the government itself facilitated. Yet if such a showing is required, prejudice is apparent in the circumstances cited at page 5 of petitioner's petition for certiorari. This is particularly clear insofar as substituting depositions for live testimony prevented the petitioner from confronting his accusers in the presence of the jury with regard to the bias flowing from the immunity agreements that the witnesses struck with the government prior to being deposed.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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